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IN THE

Supreme Court of the United States

OCTOBER TERM, 19.....

No.....

A. T. GARRETT, W. D. WALTERS
AND J. B. MCDANIEL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 2, 1969. Petition for rehearing was denied on January 19, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals which incorporates the opinion of the District Court in its entirety is reported at ____ F.2d ____ and is printed in Appendix A, *infra*, pp. 1a-8a. The opinion of the District Court is reported at 296 F.Supp. 1302.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1969. (R. Vol. III, p. 5); Appendix A, *infra,* page 9a). Rehearing was denied on January 19, 1970, without opinion. (R. Vol. III, p. 6). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Administrator of the Federal Aviation Administration may delegate to air carriers the authority to promulgate procedures which have the force and effect of rules or regulations issued by the Administrator under the Federal Aviation Act of 1958 (49 U.S.C., Sections 1301 et seq.) so as to subject airmen to civil penalties under 48 U.S.C., Section 1471, for violation of maintenance procedures established by air carriers and never approved by the Administrator.[1]

STATUTES INVOLVED

The statutes involved are Sections 601, 609 and 610 of Title VI and Sections 901 and 903 of Title IX of the Federal Aviation Act of 1958. 72 Stat. 775, 779, 780, 783 Title VI and Sections 901 and 903 of Title IX of the

[1] Public Law 89-670, Oct. 15, 1966 (80 Stat. 931, et seq; 49 U.S.C., Sections 1651 through 1659) created the Department of Transportation and transferred the Federal Aviation Agency, renamed Federal Aviation Administration, to that Department. The duties of the Administrator of the Federal Aviation Agency under Title VI of the Federal Aviation Act were continued in him as Administrator of the Federal Aviation Administration and the quasi-judicial duties of the Civil Aeronautics Board under Title VI were transferred to the National Transportation Safety Board. Substantive provisions of the Federal Aviation Act and of the regulations issued under the Act have continued, unchanged.

and 786; 75 Stat. 467; 76 Stat. 149; 49 U.S.C., Sections 1421, 1429, 1430, 1471 and 1473. They are printed in Appendix B, *infra*, pages 11a through 19a.

STATEMENT

Petitioners are mechanics employed by Eastern Airlines, an air carrier. The United States brought separate actions against them and another mechanic, W. F. Petsch, to recover civil penalties under 49 U.S.C., Section 1471(a), for the alleged failure to follow maintenance procedures established by Eastern in the assembly of a propeller. Failure to follow "approved" maintenance procedures was charged to be a violation of Section 43.13(c) of Federal Aviation Regulations [14 C.F.R., Section 43.13(c)][2] and consequently a violation of 49 U.S.C., Section 1430(a)(2). (R., Vol. I, 1 through 7). The four separate actions were consolidated for trial. (R. Vol. I, p. 14, 16). In its post-trial brief filed with the District Court, the Government withdrew its case against Petsch. (R. Vol. I, p. 448). Petitioners were found guilty and a civil penalty of $100.00 was imposed on each. (R. Vol. I, 458).

49 U.S.C., Section 1471, provides that any person who violates any provision of Title VI (safety provisions) of the Federal Aviation Act or "any rule, regulation or order issued thereunder" shall be subject to a civil penalty not to exceed $1,000 for each violation. Jurisdiction is given to the district courts to impose civil penalties at the instance of the United States Attorney by 49 U.S.C., Section 1473.

49 U.S.C., Section 1430(a)(2) provides that it shall be unlawful: "For any person to serve in any capacity as an

[2] Pertinent provisions of Regulations are reprinted in Appendix C, *infra*, pages 20a through 29a.

airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce . . . in violation of any order, rule, or regulation issued under this Title (Title VI - Safety Regulations of Civil Aeronautics)." (Parenthetical explanation supplied.)

Section 43.13 of Federal Aviation Regulations (14 C.F.R. 43.13) provides that each person maintaining civil aircraft shall use methods, techniques and practices "acceptable to the Administrator." Section 43.13(c) provides:

> *"Special provisions for air carriers and commercial operators.* Unless otherwise notified by the Administrator, the methods, techniques and practices contained in the maintenance manual or in the maintence part of the air carrier manual of a certificated air carrier or commercial operator (that is required by its operating certificate or approved operating specifications to provide a continuous airworthiness, maintenance and inspection program) constitute acceptable means of compliance with this Section."

The substantance of the charge against petitioners, therefore, was that they were liable for a civil penalty because of their alleged failure to follow an "approved" maintenance procedure established by Eastern Airlines. (Complaints, Par. V; R. Vol. I, 2, 4, 6).

49 U.S.C., Section 1421 provides:

> *"General Safety Powers and Duties.* — (a) *Minimum Standards — Rules and Regulations.* — The Administrator is empowered and it shall be his duty to promote the safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> ". . . .
>
> "(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing and overhauling of air-

craft, aircraft engines, propellers and appliances; (B) the equipment and facilities for such inspection, servicing and overhauling; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhauling shall be made, including provision for examination and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

". . ."

Petitioners defended with contentions that:

(1) The District Court was without jurisdiction to impose a civil penalty for the alleged violation of a repair procedure established by an air carrier because the statute (49 U.S.C., Section 1371) provides for civil penalties only for violations of the Act or of a "rule, regulation or order issued thereunder"; and the Administrator was without authority to delegate the rule making authority to an air carrier;

(2) That the repair procedure established by Eastern was (a) not contained in the maintenance part of Eastern's air carrier manual and had not been "approved" and (b) even if it had been in the manual, the repair procedure was inadequate to prevent errors in the assembly of the propeller in question and the error which occurred could have occurred even though the procedure was followed;

(3) That petitioners followed the prescribed procedure; and

(4) That an administrative disciplinary procedure is provided by 49 U.S.C., Section 1429, whereby the Administrator may amend, suspend or revoke airmen's certificates, subject to review *de novo* by the Civil Aeronautics Board

(now the National Transportation Safety Board) with review in the Circuit Courts of Appeal, and that it is the intent of the Act that technical matters such as maintenance procedures, especially those established by air carriers and not by rule or regulation of the Administrator, shall be supervised and enforced by especially qualified administrative and quasi-judicial authorities rather than the courts, and that the district courts therefore are authorized to enforce only rules and regulations issued by the Administrator himself. (R. Vol. I, 17 through 20).

Petitioner Garrett, who was a lead mechanic and whose only function in connection with the assembly of the propeller in question was to assign competent personnel to its assembly[3], contended that neither the law nor rule of the F.A.A. authorizes the imposition of a civil penalty on a person who is prevented by other duties assigned to him by the air carrier from participating in, and from supervising, the assembly.

Eastern Airlines has its principal repair facility in Miami, Florida, with outlying repair bases, including that at Atlanta where petitioners are employed. (R. Vol. I, 246). Ordinarily, the maintenance and repair procedures recommended by the manufacturer of an aircraft or of aircraft components are approved and required to be followed by the Administrator (R. Vol. I, 265-268) and are contained

[3] There was no contention that Petsch, McDaniel and Walters were other than competent. The uncontradicted evidence shows to the contrary and that all have advanced in their employment status since the propeller incident. In fact, Petsch was advanced to the supervisory position of shift foreman and Walters, an electrician, was certificated as a mechanic by the Administrator while these cases were pending against them in the District Court. (R. Vol. I, 331, 342.)

in the air carrier's maintenance manual. At one time, when Eastern performed all of its aircraft maintenance in Miami, this was the case with Eastern (R. Vol. I, 246); but Federal Aviation Regulations do not require an air carrier to maintain its complete maintenance manual at every repair base. An outlying repair base is required to maintain only those portions of the maintenance manual which describe the repair functions which are performed at their base. Regulations, Sections 121.135(b)(16) and (c); 14 C.F.R., Sections 121.135(b)(16) and (c). The maintenance manual of Eastern at the principal repair base in Miami contains a complete description of the procedures to be followed in overhauling and reassembling Electra propellers. However, in 1960 Eastern decentralized its maintenance and repair facilities. (R. Vol. I, 246, 247). When this occurred Eastern adopted the practice of overhauling propellers at its principal repair base in Miami and then disassembling the propellers and shipping them to outlying repair bases for reassembly and installation on aircraft. From that time until after the time of the occurrences in this case in May, 1965, the portions of the maintenance manual maintained in Atlanta contained no instructions concerning the procedures to be followed by mechanics in reassembling a propeller following overhaul. (R. Vol. I, p. 166). The only procedures afforded to Atlanta mechanics were "hand-me-down" word of mouth instructions passed on from one mechanic to another. (R. Vol. I, 246-251) and an assembly check-sheet (Government Ex. 2, R. Vol. II, p. 2) which was prepared at the Atlanta repair base. (R. Vol. I, p. 151). The assembly check-sheet was not set forth in the maintenance manual (R. Vol. I, p. 168, 263), was not prescribed by the manufacturer and had not been approved by the Administrator. (R. Vol. I, p. 151-152).

Court's Exhibit A (R. Vol. II, p. 21, *et seq.*) contains all of the procedures contained in the portions of the maintenance manual maintained in Atlanta concernnig work on Electra propellers which are relevant to the present case. See stipulation, (R. Vol. I, pp. 373-375). All of the pages in Court's Exhibit A, except one (R. Vol. II, p. 49) were issued by General Motors Corporation, Allison Division, the propeller manufacturer, and relate to the servicing (line and heavy maintenance but not shop overhaul) of a propeller, giving instructions for removing a blade, adjusting a blade and reinserting a blade properly while the propeller is mounted on an aircraft or in a moderately equipped repair shop.[4]

The page which is the single exception was written by Eastern rather than the manufacturer and was inserted in the maintenance manual in November, 1965, six months after the events in this case, as a result of changes in procedures adopted by Eastern after this case arose. (R. Vol. II, p. 49; Vol. I, p. 182) That page does relate to propeller assembly procedures at outlying bases following overhaul and will be discussed in factual sequence, *infra.*

The four engined Lockheed Electra aircraft has four

[4] See introductory statement at page 28 of Court's Exhibit A (R. Vol. II, p. 28) where a "Propeller Overhaul Manual" is referred to. Reassembly of a propeller following overhaul is a part of the overhaul procedure which is not contained in Eastern's Atlanta maintenance manual. The basic procedures followed in repair maintenance and in overhaul maintenance are different. For example, in repair maintenance, mechanics are cautioned to work on and insert propeller blades at a positive angle of 18 degrees 15 minutes to 18 degrees 30 minutes (R. Vol. II, p. 44); whereas, in overhaul maintenance the propeller is reassembled with the blades at a negative angle of minus 4 degrees with the hub mechanism in full reverse position. (R. Vol. I, pp. 255-256; Vol. II, p. 2, Govt. Ex. 2)

propellers driven by jet turbine engines. Each of the propellers has four blades and is approximately 12 feet in diameter. The propeller is an exceedingly complex mechanism and incorporates a governor to control engine speed and power. (R. Vol. I, pp. 183, 250, 261) The propellers are overhauled at the Miami repair facility and shipped to outlying repair bases for reassembly in 4 boxes, one box containing the hub assembly, one the spinner and two boxes containing two blades each. (R. Vol. I, 250).

Propellers are assembled in Atlanta on metal stands on which a propeller shaft is mounted vertically. (R. Vol. I, pp. 186-7, 393) The propeller hub is placed on the shaft nose-end up and the blades are inserted horizontally. The hub has four recesses, one for each blade, inside of which is a female spline or peripheral gear. The base of each blade is circumscribed by a male spline. (R. Vol. I, pp. 183-186, 250-261) See illustration at R. Vol. II, p. 54. Each pair of meshing teeth on the hub and blade transcribe an arc of approximately 4 degrees so that an error of one tooth in insertion of a blade will result in a 4 degree error in pitch of the blade. (R. Vol. II, p. 48) Each blade must be installed in the hub in the horizontal plane at a pitch of minus 4 degrees relative to the vertical axis of the hub with the hub mechanism in full reverse position. (R. Vol. I, pp. 255-6; Vol. II, p. 2, Govt. Ex. 2)

The mechanics in Atlanta are furnished with a manual tool or instrument called a protractor which is used to measure the pitch of the blades at a designated measuring point called the 42 inch station. (R. Vol. II, pp. 66-68; Vol. I, 257) The protractor has two bubble levels, one of which is used to zero in the instrument in the perpendicular axis of the hub and the other of the levels is used to set the

scale of the instrument and to measure the pitch of the blade in the horizontal plane relative to the perpendicular or vertical axis of the hub.

The propeller shaft in the propeller stand, on which the propeller hub is mounted for assembly, is held to the stand by a flanged collar. In May, 1965, the collars on the stands were loose and defective, permitting movement of the shaft; and the concrete floor of the Eastern repair hangar in Atlanta contained irregularities. (R. Vol. I, pp. 187, 393-401) The propeller assembly sheet in use in May, 1965, contains only one line, or step, of installation instruction for all four blades. (Govt. Ex. 2, R. Vol. II, p. 2) It did not instruct the mechanics at the Atlanta repair base that the protractor should be rezeroed in the axis of the hub prior to the insertion of *each* of the four blades. (R. Vol. I, pp. 403-405).

On May 12, 1965, leadman Garrett[5] was instructed to assign men from his crew to assemble an Electra propeller and he was asked to take charge of emergency repairs to the landing gear of a Boeing 737 jet aircraft. He was also assigned the maintenance of batteries being reconditioned and charged in the battery shop. (R. Vol. I, 219-221) On the particular shift he had only three men, in addition to himself, in his crew, McDaniel, Walters and Petsch. (R. Vol. I, pp. 219,222).

The Boeing 737 aircraft was new in the Eastern system at the time and this was the first 737 required to be placed upon jacks at the Atlanta repair base. (R. Vol. I, pp. 221-226) While he himself studied the manual on the 737 aircraft to determine the manner in which the 737 should be placed on jacks in order to avoid damage to the aircraft,

[5] A leadman or crew chief is not a supervisory employee but is an hourly-paid, working group leader. (R. Vol. I, p. 142, 159-160)

Garrett assigned petitioners and Petsch to the assembly of the propeller and Walters was assigned also to attend the battery shop. Petsch, McDaniel and Walters worked on the propeller assembly for an hour or more while Garrett was studying the manual and having telephone conferences with the Miami repair base concerning the repair requirements on the 737 aircraft. (R.Vol. I, pp. 227-229) At the end of about an hour the Boeing 737 was brought to the hanger from the flight line and Garrett called Petsch and McDaniel away from the propeller assembly to assist in bringing the 737 into the hanger. (R. Vol. I, p. 229, 230). At this time Walters left the propeller assembly to check the battery shop. (R. Vol. I, p. 230) All three returned to the propeller assembly and worked for about half an hour and McDaniel and Petsch were again called away, this time to assist in jacking up the 737 aircraft (R. Vol. I, p. 231, 382) Thereafter Petsch did not return to the propeller assembly but remained to assist with the 737 repairs.[6] Sometime later McDaniel was again called from the propeller assembly to assist in removing the 737 from the jacks and at this time all four blades had been inserted in the propeller and locked up, and the mechanical assembly was complete. (R. Vol. I, p. 236, 388) Walters, an electrical specialist, completed the assembly of the propeller electrical connections and called inspector George Brownlee to check the propeller and approve it for service. (R. Vol. I, p. 236, 337) When Brownlee inspected the propeller, none of the procedural steps in the propeller assembly sheet had been signed-off by the mechanics and Walters signed on each line of the

[6] At this time two blades had been installed and locked up. (R. Vol. I, 383) The testimony of Garrett that Petsch assisted in the assembly of the propeller for at least one and one-half hours is uncontradicted. Petsch testified that he was "not sure". (R. Vol. I, 347)

step-by-step assembly procedure although he had not personally performed each step of the operations. (R. Vol. I, p. 338) It was not unusual for a mechanic to sign off work performed by others in his crew and in his presence. (R. Vol. I, p. 261, 262, 338-340) Walters and McDaniel testified that the propeller was assembled in accordance with the instructions which they had received and in accordance with the usual practice and procedure; (R. Vol. I, 334, 338, 339, 383) and there was no evidence to the contrary. While Inspector Brownlee should have checked the angle of each of the propeller blades with the protractor at the time of his inspection, he asked Walters if each had been measured with a protractor and receiving an affirmative reply, checked the blades only with a "devil's level", a less accurate instrument than the protractor. (R. Vol. I, 321, 322)

The propeller was installed on an Electra aircraft on the following day, and shortly thereafter the pilot of the aircraft, while in flight, discovered an unusual vibration.[7] The aircraft was returned to the base and the propeller was removed and it was discovered that one blade had been installed at -8° full reverse position, rather than at -4°, or one gear tooth off the proper point of insertion.[8] The blade was reinstalled properly and the propeller was reinstalled on the aircraft. (R. Vol. I, 308-311)

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[7] An unusual noise was noted at the time the propeller was installed on the aircraft, but it was diagnosed as being due to a cross-wind. (R. Vol. I, 362-365, 370)

[8] Any error in assembly of aircraft and components is to be avoided; but the District Court correctly found (R. Vol. I, 458), that this was not a serious condition. Similar vibration could be caused by grease leaking from the propeller hub causing a state of imbalance (R. Vol. I, 203, 260) or by the harmonic created by a cross-wind (R. Vol. I, 328).

A short time later other propeller blades were discovered at time of assembly to have been improperly inserted even though the prescribed procedures had been followed and on other occasions aircraft were discovered with one propeller blade inserted improperly. (R. Vol. I, 312, 350-355, 405). As a result, Richard A. McQuillen, who at the time was Chief Steward and safety officer for the Machinists Union, collective bargaining representative of the Eastern mechanics, made an investigation to ascertain why blades could be improperly installed when the prescribed procedure had been followed. He discovered that on occasion improper insertion of propeller blades could result even though the protractor indicated proper angles of insertion when the protractor had been zeroed in the vertical axis of the hub only once. He also discovered that improper insertion could be avoided by reorienting the protractor in the vertical axis of the hub in the plane of insertion of each blade before each blade was installed. (R. Vol. I, 402, 407, 414) A diagramatic illustration of McQuillen's testimony, showing that if a propeller hub when placed on the propeller stand should come to rest out of true vertical because of the loose condition of the collar or because of the uneven hangar floor, an error in the insertion of a blade can occur unless the protractor is reoriented before each blade is installed, is contained in Appendix D, *infra*, pages 30a and 31a.

McQuillen, as safety director, filed a complaint with F.A.A. concerning the defective condition of the propeller stands and an investigation was conducted in which the supervisory personnel of Eastern Airlines and F.A.A. participated; but Foreman E. A. White of Eastern would not permit McQuillen to participate in the investigation. Subsequently the propeller stands were repaired; (R. Vol. I,

398-402) and in November, 1965, Eastern began painting an index mark on the hub and on each blade at the proper angle of insertion at the time of overhaul in Miami and issued a new assembly sheet which contained a separate instruction for the insertion of each blade, requiring each blade to be separately measured and signed off. (R. Vol. I, 181, 182)[9]

Other than to assign competent mechanics to the assembly of the propeller, Garrett took no part in its assembly since his entire time on the work shift was consumed in the emergency repair of the 737 aircraft. To hold him responsible for the work of the mechanics the Government introduced a job description from Eastern's general maintenance manual describing the duties of a lead mechanic which stated that the lead mechanic is responsible for the work of the members of his crew.[10] The District Court held that he was jointly responsible with the members of his crew, notwithstanding that Garrett was prevented from taking any part in the propeller assembly or supervising the assembly by the emergency assignment given him by the airline to return the Boeing 737 jet aircraft to service as soon as possible.

W. F. Petsch participated in the assembly of the pro-

[9] Court's Exhibit A, page 49 (R. Vol. II, p. 49), which reflects the practice of marking hub and blade with a paint stripe at time of propeller overhaul in Miami, is dated November 22, 1965, six months after the events in this case occurred. This page is the only instruction in the portion of Eastern's maintenance manual maintained in Atlanta which relates to building-up a propeller at outlying bases following overhaul and it was not in the Atlanta manual in May, 1965. (R. Vol. I, 408-410)

[10] The Government's chief witness admitted that the job description was not a maintenance procedure. (R. Vol. I, 165)

peller for at least an hour and a half and in the insertion of at least one, and probably more, blades (R. Vol. I, 383). Notwithstanding this uncontradicted fact, the Government withdrew its case against him in its brief filed with the District Court (R. Vol I, 484); and the District Court approved the Government's asserton that it had not made out a case against Petsch. (R. Vol. I, 457) Counsel for petitioners has never been able to discover any reason for the Government's withdrawal of the case against Petsch, other than, as noted previously, that at the time of the trial he had been made a foreman and had become a supervisory employee of the air carrier.

REASONS FOR GRANTING THE WRIT

I.

A NOVEL QUESTION OF NATIONAL SCOPE CONCERNING THE ADMINISTRATION OF AN IMPORTANT FEDERAL STATUTE WHICH MATERIALLY AFFECTS SAFETY IN CIVIL AVIATION IS PRESENTED.

Approximately 96,000 mechanics in the airline industry, certificated by the Federal Aviation Administrator[11] are subject to the dual disciplinary procedures provided by Congress for the enforcement of the safety provisions of the Federal Aviation Act and the safety rules and regulations of the Administrator. The two procedures are certificate action under 49 U.S.C., Section 1429, and civil penalties under 49 U.S.C., Section 1471.[12] Little statistical information concerning the relative use of the two procedures has been available from the Federal Aviation Administration but it is certain that monetary discipline is used as frequently as is certificate action.[13] This is true notwithstand-

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[11] Statistics furnished by Federal Aviation Administration.

[12] *Wilson v. C.A.B.*, 244 F.2d 773, App.D.C., 1957, cert.den. 355 U.S. 870; *Hard v. C.A.B.*, 248 F.2d 761, 7th Cir., 1957, cert. den. 355 U.S. 960; *Pangburn v. C.A.B.*, 311 F.2d 349, 1st Cir., 1962.

[13] The General Counsel of the Federal Aviation Administration advises that the most recent figures available are for the fiscal year 1968 and that:

"During fiscal year 1968, 3,173 violations of the Federal Aviation Regulations were reported to the Office of the General Counsel; 3,127 actions were processed to completion. Of the latter figure, 1,518 were proceedings involving suspension or revocation of airman certificates. Of the completed cases not involving certificate sus-

ing the fact that reported judicial decisions in certificate action cases greatly outnumber the meager dozen civil fine decisions which are in the reports.[14]

This results from several factors. First, all enforcement actions are initiated in the same fashion and the determination of which procedure will be used is made after the first step in the administrative procedure has been completed.[15] Second, ordinarily a fine is imposed for violations which are regarded not to be so serious as to justify certificate action. Third, as a practical matter a civil penalty may be imposed under either procedure and not infrequently in certificate action proceedings the Administrator has withheld certificate action upon condition of the payment of a civil penalty.[16]

The fair and proper use of the civil penalty procedure

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pension or revocation, civil penalties in the form of fines accounted for 855 cases. Total civil penalties collected ammounted to $168,643.88. There were 460 cases closed without action. The remaining cases were disposed of by referral to appropriate military authorities for action, referral to foreign governments, and by administrative action consisting of letters of correction or letters of reprimand."

[14] A list and thumbnail summary of all reported civil fine decisions which we have found is included as Appendix E, *infra,* pages 32a-33a.

[15] The first step is the notice of an investigation to the airman concerned and his response. Defendants' Exhibit 2, R. Vol. I, pp. 343-356; Vol. II, pp. 3-16; Federal Aviation Regulations, Part 13; 14 C.F.R., Section 13.1, *et seq.*

[16] An informative and authoritative review of enforcement procedures is contained in *The Traffic Cop of the Skies—F.A.A. Enforcement Actions,* 35 Journal of Air Law & Commerce 40, 1969, published by School of Law, Southern Methodist University, Dallas, Texas.

in the district courts is of much importance to the statutory enforcement scheme and to safety in civil aviation, and the practical ability of the Administrator to impose a civil penalty in the certificate action procedure, and the fact that he is not compelled by law to use the district court procedure in all cases in which he feels that a civil penalty is the proper disciplinary action, is of much pertinence to the present case.

Section 901 of the Federal Aviation Act (49 U.S.C., Section 1471) authorizes the imposition of a civil penalty in the district courts only for a violation of the Act itself or of a "rule, regulation or order issued thereunder." No such limitation is contained in Section 609 (49 U.S.C., Section 1429), the certificate action procedure, and the Administrator may impose a civil penalty under that procedure for any cause which safety in air commerce requires, irrespective of whether the Act or a regulation has been violated. It can, therefore, be of no great concern to the Admniistrator in disciplining individuals[17] which procedure is used; but it is of tremendous importance to 96,000 certificated mechanics that, in a matter so technical as aircraft maintenance procedures, they not be deprived of the expertise of the National Transportation Safety Board when the statute entitles them to a trial *de novo* in that forum rather than in a United States district court.[18]

Section 601 (49 U.S.C., Section 1421) charges the Administrator with the duty and power to prescribe and revise "reasonable rules and regulations and minimum

[17] As distinguished from in rem actions against aircraft. Cf., 49 U.S.C., Section 1473.

[18] The District Court admitted in this case that the repair procedure was too technical for it to understand. R. Vol. I, p. 453.

standards governing in the interest of safety, the inspection, servicing and overhaul of aircraft, aircraft engines, propellers and appliances." The statute does not authorize air carriers to prescribe or revise rules and regulations and minimum standards and it does not authorize the Administrator to delegate that rule making authority to an air carrier. Neither does it authorize the Administrator to use the district court procedure to impose a civil penalty upon an airman for violation of an air carrier's repair procedure which has never been approved by him as a satisfactory minimum standard.

In *Shankland v. Washington,* 5 Pet. 390, 8 L.Ed. 166, this Court established the rule applicable in cases of delegated authority and has never deviated from it. It was there stated: "It is a general rule that in all cases of delegated authority where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution, either express or necessarily implied." The President of the United States necessarily has implied authority to redelegate discretionary authority delegated to him by Congress. *Shreveport Engraving Co. v. United States,* 143 F.2d 222, 5th Cir., 1944, cert.den., 323 U.S. 749, reh'g den., 323 U.S. 815. But for an inferior administrative official to delegate discretionary authority requires express authorization. [*Cudahy Packing Co. v. Holland,* 315 U.S. 357 (1942)], except where the nature of the power necessarily requires delegation. *N.L.R.B. v. Duval Jewelry Co.,* 357 U.S. 1 (1958). The rule making authority has never been held subject to redelegation even by the Presi-

dent. Cf., *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); *Schechter Poultry Co. v. United States,* 295 U.S. 495 (1935).

The delegation to an air carrier of authority to establish repair procedures having the dignity of a rule promulgated by the Administrator himself, not only deprives interested parties of the protection of the Administrative Procedures Act in the promulgation of the rule (cf., *Allen W. Hayes v. United States,* 264 F.2d 929, 2nd Cir., 1959), but it also authorizes the air carrier to suspend the rule without the approval of the Administrator through the action of a repair foreman instructing employees to deviate from the rule.[19]

The danger of such an occurrence is demonstrated in the present case; in fact, leadman Garrett was held responsible for the work of competent mechanics to whom he had assigned the propeller assembly because the rule of the carrier stated that a part of his job duties was to be responsible for their work. But he was prevented from carrying out that responsibility by being instructed to perform the more important emergency responsibility of returning a 737 jet aircraft to service which engaged his entire attention while the propeller was being assembled.

Congress provided for imposition of civil penalties by the district courts where the Act or a rule, regulation or order issued under the Act had been violated; but it gave the Administrator virtually unlimited scope in disciplining

[19] Foreman White of Eastern testified that the propeller build-up sheet (Govt. Ex. 2, R., Vol. II, p. 2) was prepared at the Atlanta repair facility under his direction (R. Vol. I, 151. Subsequently in November, 1965, a revised build-up sheet (Defendants' Ex. 4, R. Vol. II, p. 20) was prepared. (R. Vol. I, p. 181, 182)

airmen by certificate action. The courts were given authority only to apply the studied language adopted by Congress and by the Administrator, but the Administrator was given authority to punish even for violation of customs, practices and unwritten law. As a protection to certificate holders, however, Congress provided a *de novo* review before the National Transportation Safety Board of disciplinary actions taken by the Administrator. Certificated airmen should not be deprived of the right to have technical matters reviewed by the expert tribunal established by Congress for this purpose and especially is this so where such a construction of the statute does not impair its effective administration in any respect but, to the contrary, adheres to the obvious intent of Congress to entrust to the district courts only the construction of clear language adopted by Congress or by the Administrator himself after due deliberation and publication pursuant to the Administrative Procedures Act. The authority of the Administrator, as found by the District Court, is broad; but it is not so broad as to permit him to extend or vary the statute. Cf., *Kashland v. Helvering*, 298 U.S. 441; *Fed. Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, re'h. den. 347 U.S. 965; *Peters v. Hobby*, 349 U.S. 331.

II.

THE BROAD AND LIBERAL APPLICATION OF THE CIVIL PENALTY STATUTES IN THIS CASE CONFLICTS WITH OTHER DECISIONS HOLDING THAT PENALTIES SHOULD BE STRICTLY CONSTRUED AND APPLIED.

In *Pike v. Civil Aeronautics Board*, 303 F.2d. 353, 8th Cir., 1962, in deciding whether Section 901, the civil

penalty statute, should be applied, the Court said: "Such a penalty certainly is punitive," and held that, in deciding whether a civil penalty should be imposed, both the statute and the regulation alleged to have been violated should be construed "with an attitude of reasonable strictness". Likewise, in *United States v. Proper,* 7 AVI. 18, 173, U.S.D.C., N.Y., 1962, it was held that a pilot had the right to rely on the manual and regulations of the air carrier by whom he was employed where the civil air regulations were so ambiguous as to cast doubt in the pilot's mind as to a proper determination of a Federal Aviation Agency inspector's right to access to the flight deck of an aircraft in flight; and a complaint for a civil penalty against the pilot was dismissed. These decisions comport with the usual rule that penalty statutes are to be strictly construed and applied. No other decision prior to that of the 5th Circuit in the present case departs from this basic concept of statutory construction.

Perhaps this appears to be a conflict of decision of small import; however, the adoption of a liberal or broad, rather than a strict, construction of a penalty statute carries with it a vast difference in the burden of proof resting upon the Government, tantamount to a shifting in the burden of proof. This shifting of the burden is manifest in the present case. The Government introduced no evidence that petitioners failed to follow the repair procedures which had been prescribed by Eastern Airlines. It relied entirely upon a presumption that if prescribed repair procedure had been followed the error in the assembly of the propeller would not have occurred. Notwithstanding the positive and uncontradicted testimony that the usual procedures had been followed, the District Court adopted this presumption as sufficient to sustain a violation. He found: "Thus, proof

of the accepted method carries the burden of establishing the basis for violation" (R. Vol. I, 456), and "While such instructions are verbose, technical and beyond the practical comprehension of all except the most experienced mechanic, a literal adherence to them would have affected a proper assembly in this instance" (R. Vol. I, 453). The District Court made no affirmative finding of evidence that petitioners did not adhere to the prescribed repair procedures and indeed he could not, because there was none; and in reaching this finding he ignored completely the uncontradicted testimony of Petsch and McQuillen that an error in assembly could occur, and had occurred in other cases, even though the prescribed procedure was followed. The District Court held that "The regulatory powers under the Act are broad" (R. Vol. I, 456).

These findings and this broad and liberal application of the penalty statute were approved by the Circuit Court without opinion.

Thus, the proper approach to all government regulation is involved in the determination of whether the penalty statute shall be strictly construed or broadly construed. Never does a person subject to penalty need the protection of the law more than when he is dealing with the enforcement officials of the sovereign, and this is particularly true where the Government representative is both the giver of the law and the enforcer.

III.

PUBLIC SAFETY DEMANDS THAT BLAME BE PLACED WHERE BLAME IS DUE.

Each day we see segments of our nation's population in revolt against injustices in our system of government—in

schools, in employment, and in our judicial system itself. Bombs explode in public buildings, killing and maiming the innocent, as evidence of the intensity of emotions which a sense of injustice can engender. It is imperative to public safety in air transportation, that, in their dealings with the government, the persons responsible for the mundane aspects of air safety not be burdened with the oppression of injustice and a sense of persecution. That the knowledge of a job well done is its own reward is implicit in the testimony and attitude of petitioners and their witnesses; but that attitude of responsibility for public safety can better be cultivated by the further knowledge that the job well done will be appreciated and by knowledge that blame will be placed where blame is due, than by fear of unjust prosecution. Resentments inculcated by unjust criticism and futility of endeavor breed negligence as well as outright violence. It is, therefore, imperative that the Government be scrupulously fair in its regulation both on the administrative level and on the judicial level. The Administration must constantly guard against inequities which are prone to grow from fraternalism between its representatives and the supervisory representatives of airlines with whom they deal on a daily, first name basis.

The primary responsibility for safety in the maintenance of commercial civil aircraft is placed upon the air carrier. *United States v. Lockheed Aircraft Service International, Inc.*, 202 Fed.Supp. 665, E.D. N.Y., 1962; F.A.A. Regulations, Section 121.363; 14 C.F.R., Section 121.363. The maintenance departments of air carriers are subject to the constant pressure of the needs of the service and there is constant temptation to take short cuts in returning aircraft to service. This is recognized by F.A.A. Regulations in providing that each aircraft, after it is repaired, will be ap-

proved for return to service by a certificated inspector and that the inspector, as an employee of the air carrier, must be under different supervision from the repair and maintenance department. F.A.A. Regulations, Sections 121.365(b) and (c); 14 C.F.R. 121.365(b) and (c). Thus the Regulations seek to provide for the public safety by removing the pressure of the needs of the service from the inspectors who certify the aircraft for return to service.[19a]

In the present case the propeller assembly sheet (Government Exhibit 2) was prepared by the Atlanta repair facility of Eastern Airlines. It was not included in the maintenance manual of the air carrier and was never approved by the Administrator as an adequate build-up aid.[20] In fact, the procedure for assemblying propellers following overhaul is not described at all in the portion of the air carrier's maintenance manual which is maintained in Atlanta. The assembly procedure sketchily covered by the assembly sheet was handed down by word of mouth from mechanic to mechanic. The assembly sheet did not require the reorientation of the protractor in the plane of each blade before that blade was installed and the mechanics had not discovered at the time the present case arose that such reorientation is essential to avoid error in the insertion of blades. Subsequently the mechanics themselves, under the auspices of the safety program sponsored by their Union, the International Association of Machinists, made an investigation

[19a] See also the additional precautions to insulate inspectors from service pressures in Regulation 121.369(8).

[20] The propeller build-up sheet is not a maintenance procedure in and of itself. However, the maintenance manuals of air carriers do contain build-up sheets which are a *part* of the maintenance procedures described in the manuals (R. Vol. I, 167, 168).

to discover why errors occurred in the insertion of blades in Atlanta. McQuillen, the safety director who made the investigation, did not make a positive determination of the reasons why the errors occurred but he did discover that the errors could be avoided by a reorientation of the protractor. The evidence shows that the protractor is a manually held instrument, separate from and unattached to the stand on which the propeller being assembled is mounted. It shows that there are irregularities in the concrete floor of the hangar and that the collar on the propeller stand was loose so that it was possible for the hub of the propeller to come to rest out of plumb with a true vertical axis when it was placed on the stand. (R. Vol. I, 405-407). The evidence also shows that in some better equipped repair shops the protractor is incorporated as a physical part of the propeller stand itself so that the measurements made by this more elaborate device are relative to the stand rather than to the earth's gravitation. (R. Vol. I, 248, 249)

Even "the most experienced mechanics" should not have been expected to know that when the template and scale of an instrument which measures angles by gravitation is zeroed relative to a propeller hub which is inclined out of true vertical, the angular scale of the instrument will give an erroneous measurement in a plane at 180° on the hub from the plane in which the instrument was zeroed and that the angular error in degrees will be double the incline of the hub in the plane in which the instrument was oriented. The physical fact that such an error will result unless the instrument is reoriented before each measurement is made is demonstrated by the diagrams contained in Appendix D, *infra*, pp. 30a-31a. Perhaps a professional engineer might have anticipated that such an error would occur; but Foreman White, the F.A.A. Regional Represen-

tatives, the District Court and the Circuit Court apparently did not perceive it even when pointed out and explained to them. Hourly-paid mechanics should not be expected to anticipate error when none of the instructions given them by the Airline told them that reorientation is essential before each blade is measured if error is to be avoided.[21]

Subsequent to the event in question Eastern Airlines repaired the propeller stands. It also began painting index marks on the hub and on each propeller blade at the proper angle of insertion at the time propellers were overhauled at the Miami repair base and it adopted a four-step assembly sheet which requires each blade to be separately measured with the protractor. Notwithstanding all of these facts the Courts below failed to perceive that the unapproved assembly procedure in effect when this case arose was inadequate to insure against error.

Foreman White of Eastern Airlines, the employee of Eastern who is responsible for proper repairs at the Atlanta hangar and who was responsible for the promulgation of the assembly sheets, was the chief witness for the Government. It does not appear that either Eastern Airlines or Foreman White were disciplined because of the events in

[21] The only instructions on the use of the protractor contained in the maintenance manual in Atlanta are in Court's Exhibit A, pages 65-67, (R. Vol. II, p. 65-67). At page 67, mechanics are instructed that each blade on a propeller mounted on an aircraft must be checked with the blade in the 9 o'clock position. This instruction insures that the blade to be checked is always in the same plane as that in which the instrument is oriented and accomplishes the same function as reorienting the instrument before each measurement. But such is not the equivalent of an instruction that, when a propeller is being assembled in the shop mounted horizontally on a stand and incapable of being rotated, the instrument must be reoriented in the plane of each blade before that blade is measured.

question but it does appear that precautions ultimately were taken by them to avoid the repetition of the event. When these circumstances are viewed in the light of the uncontradicted testimony of McQuillen as to the inadequacy of the instructions which had been given to the mechanics upon the use of the protractor, it is shown that the blame in this case was not placed where it was due. This inference of fraternalism between representatives of F.A.A. and of the air carrier so as to avoid placing responsibility where it is due contributes greatly to the assumption by this case of its status of importance to petitioners and their fellow mechanics.

This inference is accentuated by the prosecution of lead mechanic Garrett whose only act in connection with the assembly of the propeller was to assign mechanics of unquestioned competence to perform the work and who was prevented by his assignment to other more important emergency duties from personally supervising the propeller assembly. Garrett was involved only because his job description provides that he is responsible for the work of his crew. By the same token, Foreman White is likewise responsible, as is the air carrier. The prosecution of Garrett is in sharp contrast to the abandonment by the Government of the case against Petsch. Petsch participated in the actual assembly of the propeller as fully as did McDaniel but the evidence shows that at the time of the trial he had been made a foreman. There is absolutely no justification in the evidence for a difference in the case against Petsch and that against McDaniel. Walters, the electrician, performed more work on the propeller than any other employee but he was not as directly involved in the mechanical insertion of propeller blades as were Petsch and McDaniel.

To say that the injustice in the conduct of the Govern-

ment and in the judicial result in this case has perplexed and astounded counsel for petitioners is a gross understatement. It is no doubt always an error to feel that a case can have only one outcome but we are unable to understand how the District Court and the Circuit Court were unable to perceive the error and the injustice in the result which they espoused.

If mechanics responsible for safety in air commerce do not receive scrupulously fair and equal treatment both by the Administration and by the courts and if they are to feel that responsibility for errors of the air carrier can be passed to their shoulders, notwithstanding their conscientious interest in and efforts toward air safety, it cannot be expected that their devotion to duty shall not suffer.

CONCLUSION

For each of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PLATO E. PAPPS

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